Supreme Court, U. S.
JUL 6 1977
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Supreme Court of the United States

October Term, 1976

No. 77-401

IN RE ESTATE OF ALFRED E. TONTI, DECEASED

A. PATRICK TONTI,
Petitioner,

vs.

MARY B. TONTI, JAMES C. PETROPOULOS, AND CITY NATIONAL BANK AND TRUST COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio

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Supreme Court of the United States

October Term, 1976

No. .....

IN RE ESTATE OF ALFRED E. TONTI, DECEASED

A. PATRICK TONTI,
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MARY B. TONTI, JAMES C. PETROPOULOS, AND CITY NATIONAL BANK AND TRUST COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio

Petitioner A. Patrick Tonti respectfully prays that his petition for a writ of certiorari be granted to review the judgment of the Supreme Court of Ohio entered in this case on April 8, 1977, and the petition for rehearing denied on June 3, 1977.

OPINIONS BELOW

The judgment and opinion of the Supreme Court of Ohio, which is not reported, appears in Appendix A to this petition. The Franklin County Court of Appeals opinion, which is not reported, appears in Appendix B hereto. The opinion and judgment entry of the Franklin County Probate Court, also not reported, appears in Appendix C.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on April 8, 1977, and a petition for rehearing was denied on June 3, 1977. This petition for certiorari was timely filed within 90 days of the date of judgment. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

1. Was Petitioner denied due process of law by reason of the self-admitted bias and prejudice of the probate judge below?

2. Was Petitioner denied due process of law by reason of the refusal of the biased and prejudiced probate judge to allow a full and fair opportunity to submit evidence in support of Petitioner's claim for relief in the probate court?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment

> Section 1. * * * [N]or shall any state deprive any person of life, liberty, or property, without due process of law * * *.

Ohio Constitution, Article IV, §5

* * * * *

> (C) The chief justice of the supreme court or any judge of that court designated by him shall pass upon the disqualification of any judge of the courts

> of appeals or courts of common pleas *or division thereof*. Rules may be adopted to provide for the hearing of disqualification matters involving judges of courts established by law.

Ohio Revised Code, Title 21: §2101.39

> When a probate judge has a prejudice, either for or against a party or his counsel in a matter or cause pending before him, or is otherwise interested in such cause or matter, or disqualified to sit therein, but the prejudice, interest, or disqualification is not such as to permit or require certification of the proceedings to the court of common pleas as provided by section 2101.38 of the Revised Code, any party to such cause or matter, or the counsel of any such party, may file an affidavit setting forth such prejudice, interest, or disqualification. The fact of the filing of such affidavit shall be entered upon the record of the court. The judge may upon his own motion make an entry setting forth such prejudice, interest, or disqualification.
>
> Forthwith upon the filing of such affidavit or the making of such entry the judge shall notify the chief justice of the supreme court who, if satisfied that such prejudice, interest, or disqualification exists, shall assign some probate judge or some judge of the court of common pleas to hear the cause or matter in place of such probate judge. The judge assigned shall proceed and try such cause or matter. The affidavit referred to in this section shall be filed not less than three days prior to the time set for the hearing of such cause or matter.

Ohio Rules of Civil Procedure, Rule 7(B)(2)

"To expedite its business, the court may make provision by rule or order for submission and determination of motions without oral hearing. * * *"

Rules of the Probate Court of Franklin County, Ohio, Rule 1.1

"Counsel desiring that their pleadings, applications, motions, etc., be set for hearing, shall by written application request the Court to fix a date for hearing, and when such date is set by entry, shall give reasonable notice thereof to counsel for the adverse party. * * *"

Ohio Code of Judicial Conduct, Preface

"* * * The canons and text establish mandatory standards unless otherwise indicated."

Ohio Code of Judicial Conduct, Canon 3(c)

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party * * *."

STATEMENT OF THE CASE

This case was decided by a probate judge who was biased and prejudiced against Petitioner and was biased and prejudiced in favor of the Administrator of the estate of Petitioner's deceased father.

On grounds of newly discovered evidence, Petitioner instituted this action in the Probate Court of Franklin County, Ohio, on August 6, 1975, to obtain relief from a prior judgment in a case between the same parties and heard by the same probate judge. The newly discovered evidence raised issues of fact and law wholly different from the issues previously heard by that court. While Petitioner's Motion for Relief From Judgment was accompanied by affidavits, Petitioner also requested an evidentiary hearing before the probate court in order to present all of his evidence relevant to his claim of newly discovered evidence.

Before hearing or judgment, Petitioner's counsel asked the probate judge to remove himself from this case because of bias and prejudice. This request was based upon the fact that in prior unrelated matters the judge admitted his bias and prejudice against Petitioner and removed himself from those cases. In addition, Petitioner believed the judge to be biased and prejudiced in favor of the Administrator of the estate by reason of close political, social and business relationships existing between the Administrator and the judge. The Administrator had been appointed by the probate judge after the judge removed Petitioner as the Executor appointed by the last will and testament of his deceased father. Notwithstanding the actual bias and prejudice, the probate judge refused to remove himself from this case.

In accordance with Ohio Revised Code, §2101.39 and Article IV, §5 of the Ohio Constitution, Petitioner and his attorney filed affidavits of prejudice, asking the Chief Justice of the Ohio Supreme Court to remove the probate judge and appoint a special judge. Petitioner's affidavit set forth facts concerning the bias and prejudice of the

judge (Appendix D). Petitioner's attorney filed the following affidavit:

> "JOHN M. ADAMS, being first duly sworn, says that he was first employed to represent A. Patrick Tonti in connection with litigation with the Estate of Alfred E. Tonti in the Fall of 1974, about the time of Judge Metcalf's decision in the Tonti Securities matter; that when Judge Metcalf began to indicate that he would hear cases involving ownership of other companies, A. Patrick Tonti requested that affiant get Judge Metcalf disqualified because A. Patrick Tonti felt he was prejudiced; that affiant visited Judge Metcalf on January 14, 1975 in his chambers and told him of his client's attitude; that Judge Metcalf thought about the problem for a minute or two, turned to affiant and said 'By God, he's right; I am prejudiced against him,' whereupon Judge Metcalf immediately placed a call to Judge William Radcliff, Administrative Assistant to the Supreme Court of Ohio, which eventually resulted in Judge Robert F. Allen being assigned to hear subsequent matters."

The probate judge, Richard B. Metcalf, responded by filing his own counter-affidavit in which he admitted his prejudice against Petitioner and failed to deny his bias and prejudice in favor of the Administrator of the estate. Omitting formal parts the judge's affidavit reads as follows:

> "Richard B. Metcalf, being first duly sworn, deposes and says that he is the trial judge in the above entitled matter; that an affidavit has been filed with the Supreme Court of the State of Ohio by John M. Adams alleging that this affiant said, 'By God, he's right; I am prejudiced against him.' Your affiant says that this may not be an exact quotation but

> is substantially correct; that the full context of the conversation was to the effect that the trial court felt that Pat Tonti had lied and that several of his witnesses had lied about the same transaction. Your affiant says that now Patrick Tonti, by way of the attached motion, admits that his statements during the trial were not true. The previous statement quoted was made at a time when a further proceedings before this court was to be had in a separated matter and the court frankly admitted that he should not hear that matter inasmuch as the court might very well be prejudiced against somebody who would appear before him and, under oath, lie about transactions.
>
> In response to the affidavit by A. Patrick Tonti this affiant would only point out that A. Patrick Tonti has failed to tell the truth in this proceedings on other occasions.
>
> Further the affiant sayeth naught."

Notwithstanding this conclusive evidence of bias and prejudice, the Chief Justice of the Ohio Supreme Court, on October 27, 1975, refused to remove the probate judge from this case (Appendix E).

Thereupon the probate judge summarily overruled Petitioner's Motion for Relief From Judgment without granting an evidentiary hearing, thereby depriving Petitioner of a full and fair opportunity to present all of his evidence in support of his cause of action (Appendix C).

On appeal to the Franklin County Court of Appeals, Petitioner raised the issue of denial of due process by reason of the bias and prejudice of the probate judge and the issue of denial of due process by reason of the probate court's failure to afford a full and fair opportunity

to present evidence in support of the claim. The Court of Appeals held that Petitioner was not entitled to a further opportunity to present evidence to the probate court and that it was without jurisdiction to reach the merits of the issue of the bias and prejudice of the judge (Appendix B).

The federal due process issues were again raised in the appeal to the Ohio Supreme Court which was dismissed on the ground that this case presents no substantial constitutional questions (Appendix A).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Violates the Due Process Clause of the Fourteenth Amendment by Denying Petitioner's Right to a Trial Before a Fair and Unbiased Judge.

The decision of the state court below is not in accord with the decisions of this Court. A fundamental requirement of due process is a fair trial before a fair tribunal. *In Re Murchison*, 349 U.S. 133 (1955). And, fairness requires an absence of actual bias on the part of the fact-finder judge. *Id.* In *Murchison, supra,* this Court stated:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. * * * This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear and true between the * * * parties * * * denies the latter due process of law' * * * But to perform its high function in the best way 'justice must satisfy the appearance of justice.' " 349 U.S. 136.

See also Mayberry v. Pennsylvania, 400 U.S. 455, 465 (1971) (". . . concern of due process is with the fair administration of justice."); *Commonwealth Coatings Corp. v. Continental Casualty Co.,* 393 U.S. 145, 150 (1968) (". . . any tribunal . . . not only must be unbiased but also must avoid even the appearance of bias."); *Offutt v. United States,* 348 U.S. 11 (1954); *Tumey v. Ohio,* 273 U.S. 510 (1927). Prior decisions of the Ohio courts were in accord with these principles. *See State ex rel. Pratt v. Weygandt,* 164 Ohio St. 463, 132 N.E.2d 191 (1956); *State ex rel. Turner v. Marshall,* 123 Ohio St. 586, 176 N.E. 454 (1931); *White v. Hicks,* 118 Ohio App. 56, 193 N.E.2d 193 (1961).

At pretrial stages of the proceedings below the probate judge twice admitted his actual bias and prejudice against Petitioner, first in a conversation with Petitioner's attorney, and later in an affidavit filed with the Chief Justice of the Ohio Supreme Court. In addition, the uncontroverted affidavit of Petitioner (Appendix D) demonstrated a bias and prejudice of the judge in favor of the person appointed Administrator of the estate by the judge. Yet, the probate judge refused to remove himself from this case; and the Ohio Chief Justice refused to exercise his constitutional duty to remove the judge pursuant to Article IV, §5 of the Ohio Constitution.

The prejudiced judge then proceeded to summarily deny Petitioner's claim for relief without affording Petitioner a full and fair opportunity to present his evidence.

The action of the self-admitted biased and prejudiced judge was in direct contravention of his mandatory duty

to remove himself from the case under Canon 3(C) of the *Ohio Code of Judicial Conduct.* See Preface to the *Code of Judicial Conduct.* Accordingly, Petitioner's due process rights were violated by the judgment of the probate court below which was a nullity and of no legal force or effect by virtue of the total absence of power, authority and jurisdiction of the prejudiced judge. *See Cuyahoga County Board of Mental Retardation v. Association of Cuyahoga County Teachers of the Trainable Retarded,* 47 Ohio App. 2d 28, 351 N.E.2d 777 (1975) (action of biased and prejudiced judge wholly void and of no legal effect). *See also Commonwealth Coatings Corp. v. Continental Casualty Co.,* 393 U.S. 145, 150 (1968).

Both the state Court of Appeals and the Ohio Supreme Court denied Petitioner relief from the action of the biased and prejudiced judge.

Petitioner was denied his due process right to a fair and unbiased tribunal by reason of the bias and prejudice of the probate judge.

2. The Decision Below Violates the Due Process Clause of the Fourteenth Amendment in That the Prejudiced Probate Judge Denied Petitioner a Full and Fair Opportunity to Present All of His Evidence in Support of His Claim for Relief From Judgment.

This case originated as an action in the Probate Court of Franklin County, Ohio, in which Petitioner was seeking relief from a prior judgment of that court on grounds of newly discovered evidence. Petitioner's Motion For Relief From Judgment was accompanied by affidavits setting forth sufficient facts to meet the threshold factual showing required by Ohio law. *See Adomeit v. Baltimore,*

39 Ohio App. 2d 97, 316 N.E.2d 469 (1974); *Brenner v. Shore,* 34 Ohio App. 2d 209, 297 N.E.2d 550 (1973); *Matson v. Marks,* 32 Ohio App. 2d 319, 291 N.E.2d 491 (1972).

Petitioner had other evidence in support of his claim for relief from judgment in addition to that contained in the affidavits. Accordingly, Petitioner requested an evidentiary hearing in order to present such additional evidence. The request for hearing was stated on the face of Petitioner's Motion for Relief From Judgment.

Petitioner justifiably believed that he was entitled to an evidentiary hearing by reason of *Probate Rule* 1.1 of the Franklin County Probate Court which provided in part that pleadings and motions would be set for hearing upon request of counsel. In addition, *Ohio Rules of Civil Procedure,* Rule 7(B)(2) contemplated an oral hearing of pleadings and motions unless otherwise provided by court order or local court rule.

Since the local court rule afforded Petitioner the right to an evidentiary hearing, and the probate judge did not order submission of the entire case on affidavits, Petitioner was entitled to a hearing in order to present evidence in support of his claim. But the probate judge summarily overruled Petitioner's Motion for Relief from Judgment without an evidentiary hearing and without affording Petitioner notice and opportunity to present his additional evidence in the form of affidavits. Accordingly, Petitioner was effectively denied the right to present his evidence.

The fundamental requirement of due process of law is the opportunity to be heard. The fundamental right to be heard is one that has been recognized many times by this Court. *E.g., Goldberg v. Kelly,* 397 U.S. 254 (1970); *Grannis v. Ordean,* 234 U.S. 385 (1914); *Louisville & N. R. Co. v. Schmidt,* 177 U.S. 230 (1900).

Petitioner was denied due process of law by the prejudiced probate judge's refusal to afford an opportunity to present evidence in support of his claim.

CONCLUSION

For the foregoing reasons, it is respectfully prayed that a Writ of Certiorari be issued to review the judgment of the Supreme Court of Ohio.

Respectfully submitted,

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APPENDIX A

JUDGMENT ENTRY OF THE SUPREME COURT OF OHIO

(Filed April 8, 1977)

No. 77-131

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

IN RE ESTATE OF ALFRED E. TONTI.

APPEAL FROM THE COURT OF APPEALS
FOR FRANKLIN COUNTY

This cause, here on appeal as of right from the Court of Appeals for Franklin County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismissed the appeal for the reason that no substantial constitutional question exists herein.

ORDER OF THE SUPREME COURT OF OHIO OVERRULING MOTION TO CERTIFY RECORD

(Filed April 8, 1977)

No. 77-131

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

IN RE ESTATE OF ALFRED E. TONTI.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR FRANKLIN COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

ORDER OF THE SUPREME COURT OF OHIO DENYING REHEARING

(Filed June 3, 1977)

No. 77-131

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

IN RE ESTATE OF ALFRED E. TONTI.

REHEARING

It is ordered by the court that rehearing in this case is denied.

APPENDIX B

OPINION OF FRANKLIN COUNTY COURT OF APPEALS

(Rendered December 7, 1976)

No. 76AP-43

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

IN THE MATTER OF THE ESTATE OF:
ALFRED E. TONTI, DECEASED.

DECISION

STRAUSBAUGH, *P. J.*

This is an appeal filed by appellant from an order of the Probate Court of Franklin County overruling appellant's motion for relief from judgment filed pursuant to Civ. R. 60(B), on the grounds of newly discovered evidence. This motion was filed on August 6, 1975, along with affidavits, exhibits and a memorandum of law. The motion related to a final judgment of the Probate Court entered November 1, 1974, overruling appellant's exception to the partial inventory filed by the administrator of decedent's estate. The Probate Court judgment was affirmed by this court in unreported case numbers 75AP-473 and 75AP-474, (1976 Decisions, page 626).

On September 5, 1975, appellant filed an affidavit of prejudice seeking the disqualification of the probate judge from hearing or ruling upon the present matter because of bias and prejudice. On October 27, the Chief Justice of the Ohio Supreme Court held, as a matter of law, that

there was no legal prejudice on the part of the probate judge. On December 9, 1975, the Probate Court made the following judgment entry:

"This matter came on to be heard on Motion of A. Patrick Tonti for relief from the Final Judgment of this Court entered herein on November 1, 1974 and for a new trial.

"The Court has considered the Affidavits presented by Movant and the detailed memoranda of counsel and has issued an Opinion.

"NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED and DECREED that:

"(1) The Motion of A. Patrick Tonti for a new trial is denied; and,

"(2) The Motion of A. Patrick Tonti to vacate and set aside the Final Judgment of this Court entered on November 1, 1974, is denied and the said judgment shall stand. * * *"

In the original proceedings, which judgment was appealed to this court, hearings were held on eleven days before the trial court; there was the testimony of twenty witnesses, two depositions, and one hundred seventy-five exhibits. On November 1, 1974, the Probate Court dismissed with prejudice appellant's claim excepting to the inclusion of the stock of Tonti securities in the partial estate of Alfred E. Tonti.

On August 6, 1975, appellant filed his motion for relief from judgment based upon the grounds of newly discovered evidence requesting that the Probate Court vacate its judgment of November 1, 1974, and award appellant a new trial. Accompanying his motion, appellant filed

a memorandum of law, exhibits and the following two affidavits:

"* * *

"JOSEPH W. SLATTERY, being first duly cautioned and sworn, deposes and says as follows:

"1. That he is an adult person residing at 6561 Red Coach Lane, Columbus, Franklin County, Ohio.

"2. That he was employed as an accountant and bookkeeper by and for Alfred, Inc. from approximately 1959 to 1966, during which time Alfred, Inc. was an Ohio corporation owned by A. Patrick Tonti and operated and directed by Alfred E. Tonti, father of the said A. Patrick Tonti, and that affiant worked at and under the supervision and direction of Alfred E. Tonti.

"3. That during the period 1959 to 1966, Alfred, Inc. provided office space and accounting services to some 50 real estate corporations, partnerships and individual proprietorships which were owned by Alfred E. Tonti; A. Patrick Tonti, his son; Raymond S. Tonti, his brother; William Hanneman, his son-in-law; and certain other relatives of Alfred E. Tonti, said services being provided pursuant to agreements between Alfred, Inc. and the various business entities.

"4. That in 1966 affiant became employed by 34 Corporation as an accountant and since that time has worked at the direction of A. Patrick Tonti.

"5. That during this entire period of time and until the death of Alfred E. Tonti in January, 1972, there existed a very close personal and business relationship between Alfred E. Tonti and A. Patrick Tonti, his only son, and that there was a continuous effort

made by Alfred E. Tonti to help and assist his son in various businesses and business relationships.

"6. That Alfred E. Tonti expressed the desire to assist his son in the acquisition and operation of savings and loan institutions, and that as a result thereof Alfred E. Tonti and A. Patrick Tonti planned for and negotiated the purchase of 93 per cent of the stock of the Massillon Savings and Loan, Massillon, Ohio and together negotiated financing therefor.

"7. That on April 6, 1964, an Ohio corporation known as Tonti Securities Company ('Tonti Securities') was organized for the purpose of holding the stock of Massillon Savings and Loan.

"8. That the incorporators of Tonti Securities were Alfred E. Tonti, Josephine Sheskey and affiant, that the original subscription of 50 shares was issued to Alfred E. Tonti on April 6, 1964 in exchange for $500.00 paid by a check drawn on Alfred E. Tonti's Broad Westgate account, Huntington National Bank, Columbus, Ohio, and that Alfred E. Tonti was issued Stock Certificate No. 1 for said 50 shares, the shares representing all of the issued stock.

"9. That on April 7, 1964, in affiant's presence, Alfred E. Tonti completed the assignment on the back of Certificate No. 1 and of his own free will signed the assignment and requested affiant to witness the assignment, which affiant did.

"10. That at the time of the said assignment of Certificate No. 1, Alfred E. Tonti stated that he was thereby making a gift of the 50 shares of Tonti Securities to A. Patrick Tonti.

"11. That Certificate No. 2 of Tonti Securities was issued on April 8, 1964 identifying A. Patrick Tonti as the owner of said 50 shares of stock.

"12. That thereafter Alfred E. Tonti continued to operate and manage the business of Massillon Savings and Loan and Tonti Securities for A. Patrick Tonti, and that between July, 1964 and September, 1965, companies owned by A. Patrick Tonti made substantial unsecured loans to Tonti Securities to complete the purchase of the stock of Massillon Savings and Loan, to repay obligations to lenders who financed the purchase, and for other necessary business purposes of Tonti Securities.

"13. That during the period of my employment by Alfred, Inc., Alfred E. Tonti had authority to sign checks drawn on the individual business account of A. Patrick Tonti at the Huntington National Bank, being account number 0412-0002-39-2608-7, and that during the period 1959 to 1966, Alfred E. Tonti did sign A. Patrick Tonti's name to 620 of 805 checks drawn on said account.

"14. That on September 30, 1965, Alfred E. Tonti directed the affiant to prepare a check drawn on the said A. Patrick Tonti account and payable to Alfred E. Tonti's Broad Westgate account at the Huntington National Bank, account number 0412-0002-39-2616-7, in the face amount of $500 and further directed affiant to note on the face of the check and on the check stub that the check was for the purpose of paying Alfred E. Tonti for the 50 shares of Tonti Securities stock that Alfred E. Tonti had endorsed and assigned over to A. Patrick Tonti on April 7, 1964.

"15. That on September 30, 1965, affiant prepared the check in the manner he was directed to do

so and as described in the preceding paragraph, said check being number 342 drawn on the account of A. Patrick Tonti, a true copy of which is attached hereto as Exhibit 1.

"16. That on September 30, 1965, Alfred E. Tonti, in affiant's presence, did sign and execute A. Patrick Tonti's name on said check as drawer, and that A. Patrick Tonti was not then present.

"17. That Alfred E. Tonti on September 30, 1965 also directed affiant to endorse said check number 342 to Alfred E. Tonti's Broad Westgate account for deposit only and to prepare a deposit ticket for deposit of said check to Alfred E. Tonti's account, and that affiant did so and noted on the deposit ticket that the $500.00 check deposit was from A. Patrick Tonti to repay a loan of April 6, 1964 to purchase the stock of Tonti Securities Company. A true copy of the deposit ticket is attached as Exhibit 2.

"18. That Alfred E. Tonti did deposit check number 342 to his Broad Westgate account on or about October 4, 1965.

"19. That affiant, while in the employ of Alfred, Inc., was an accountant and that as part of his duties he regularly worked on the books and records of the company and other entities serviced by Alfred, Inc. and that during his employment he probably prepared in excess of 5,000 checks for several millions of dollars.

"20. That affiant did not recall have prepared check number 342 at Alfred E. Tonti's direction and did not recall any of the facts contained in paragraphs 14 through 18 of this affidavit until late June, 1975 or early July, 1975 when affiant was engaged in an

investigation of investment accounts of A. Patrick Tonti.

"21. That affiant had not informed A. Patrick Tonti of any of the facts contained in paragraphs 14 through 18 of this affidavit until affiant recalled said facts while he was in the process of said investigation for A. Patrick Tonti in late June or early July, 1975.

"22. That A. Patrick Tonti did not personally manage or reconcile his checking accounts or personally keep and manage his business records and books since at least 1959 to the present time and did not sign said check number 342.

"23. That all of the checking accounts, books and records of A. Patrick Tonti were managed and reconciled by affiant or other accounting personnel during the period 1959 to present.

"24. That when the affiant was questioned prior to and at the trial of this action concerning the endorsement and assignment of stock certificate No. 1 of Tonti Securities from Alfred E. to A. Patrick Tonti, affiant stated to A. Patrick Tonti and testified at trial that Alfred E. Tonti at the time of said assignment on April 7, 1964 had stated that he was making a gift of said shares to his son A. Patrick Tonti, and affiant did not recall and therefore did not state that check number 342 had been issued eighteen months later on September 30, 1965 in payment for said shares.

"25. That not until late June or early July, 1975 was the affiant's memory refreshed when he discovered the existence of check number 342 during a review of the investment accounts of A. Patrick Tonti,

at which time and for the first time did affiant inform A. Patrick Tonti of the existence of check number 342.

"26. The facts contained in this affidavit are of my own personal knowledge and are true and correct as I verily believe.

"* * *"

"* * *

"A. PATRICK TONTI, being first duly cautioned and sworn, deposes and says as follows:

"1. That I am an adult person residing at 1921 Harwitch Road, Columbus, Ohio.

"2. That while I was attending the University of Notre Dame from 1947 to 1951, my father, Alfred E. Tonti, was interested in introducing me into the real estate development and building business, and I was also interest in said business. At this time I was under the age of 21 and my father took title to certain properties in South Bend, Indiana upon which I then constructed and renovated houses and sold them.

"3. My father assisted me by financing these projects, and as the properties were sold the profits were received by me.

"4. After graduating from the University of Notre Dame in 1951, I returned to Columbus, Ohio, where my father lived, and continued in the real estate and building business with the assistance of my father. My father assisted me in many ways. He gave me advice and consultation during the development of real estate projects and helped secure mortgage loans and other financing for my business activities. My father also made gifts of certain real estate to me which property was used in my business.

"5. During the period from 1951 to my father's death in 1972, he made many gifts to me, to my sisters, and to others of real estate and other properties. My father also made gifts to me of certain stocks of corporations, including Alfred, Inc., a corporation engaged in the business of leasing space to and providing accounting services for some 50 real estate businesses owned by my father, myself or other relatives.

"6. During this same period, my father made gifts to his two daughters, Rosemary and Regina, their spouses and children of real estate and certain corporations owning real estate. In many instances, my father would continue to operate and control these properties and companies for the benefit of his daughters. He also assisted their spouses by helping them organize real estate companies, obtaining loans, purchasing land, and advising them in such businesses.

"7. In early 1964 Alfred E. Tonti became interested in introducing me into the business of owning small financial institutions and I was also interested. To this end, my father and I negotiated the purchase of 93 per cent of the stock of Massillon Savings and Loan, Massillon, Ohio, and negotiated the financing therefor from the Union Commerce Bank, Cleveland, Ohio.

"8. On April 6, 1964, Tonti Securities Company ('Tonti Securities') was organized to receive and hold the stock of Massillon Savings and Loan. The original subscription of 50 shares of Tonti Securities was issued to Alfred E. Tonti on April 6, 1964, said shares representing all of the issued and outstanding stock.

"9. Stock Certificate No. 1 of Tonti Securities was issued to Alfred E. Tonti on April 6, 1964 for

50 shares of fully paid and non-assessable capital stock of Tonti Securities.

"10. On the reverse side of Stock Certificate No. 1 appears my father's true signature of endorsement assigning said shares to A. Patrick Tonti or his nominee, which endorsement is dated April 7, 1964 and witnessed by the true signature of Joseph W. Slattery.

"11. Stock Certificate No. 2 of Tonti Securities is dated April 8, 1964, contains the true signature of Alfred E. Tonti as president of Tonti Securities, is witnessed by the true signature of Josephine Sheskey as secretary of Tonti Securities, and identifies A. Patrick Tonti as the owner of 50 fully paid and non-assessable shares of Tonti Securities, which certificate represents all of the issued and outstanding shares of Tonti Securities.

"12. On the afternoon of April 8, 1964, Alfred E. Tonti delivered to me said Stock Certificate No. 1 as endorsed together with the Stock Certificate No. 1 stub and also delivered to me the said Stock Certificate No. 2 in the name of A. Patrick Tonti as owner together with the stub of Stock Certificate No. 2.

"13. At the time my father delivered these stock certificates to me he stated that he was making a gift of the stock of Tonti Securities to me and that he wanted me to have the stock. I accepted the certificates he gave me and took possession of them at that time.

"14. I then took the stock certificates to my home and delivered them to my wife, Mary Kirwin Tonti, who placed the certificates together with their stubs in my home vault where they remained continuously

from April 8, 1964 until after the death of my father in 1972. On April 8, 1964, I told my wife that the Tonti Securities stock certificates were a gift from my father and that the company would hold the stock of Massillon Savings and Loan.

"15. On or about April 10, 1964, Tonti Securities became the owner of 93 per cent of the stock of Massillon Savings and Loan.

"16. After the death of Alfred E. Tonti in January, 1972, the administrators of his estate included in its inventory all of the stock of Tonti Securities, being the 50 shares evidenced by Stock Certificate No. 2. I excepted to the inclusion of the stock of Tonti Securities in the inventory of the estate of Alfred E. Tonti and asserted my ownership in said stock.

"17. A hearing on my exception to the inclusion of the Tonti Securities stock in my father's estate commenced in this Court in November, 1972, was halted after approximately 10 days of hearings by the Court, was reconvened one year later in November, 1973 and the hearing was completed in November or early December of 1973. The case was fully submitted to the Court by February 15, 1974. On October 8, 1974, the Court issued its findings of fact and conclusions of law in which it concluded that the affiant 'had not borne the burden of proving that the shares of Tonti Securities were an inter vivos gift to him by Al Tonti' and that the shares 'were properly included in the Inventory of the Estate of Alfred E. Tonti.' The Court entered a final judgment on November 1, 1974 adjudging that the stock of Tonti Securities was properly included in the inventory of the estate and dismissing the affiant's exception to its inclusion.

"18. The case in which said final judgment was rendered was presented, tried and determined on the issue of whether or not Alfred E. Tonti had made an inter vivos gift of the stock of Tonti Securities to the affiant. The affiant presented witnesses, including Joseph W. Slattery, who testified that a completed gift transaction occurred on April 8, 1964 between Alfred E. Tonti, as donor, and affiant, as donee.

"19. In preparation for trial and during the trial itself, affiant made inquiries of Joseph W. Slattery and Josephine Sheskey concerning the transactions of April 7 and 8, 1964 and was always told by said persons that Alfred E. Tonti had clearly and unequivocally stated at the time of the stock assignment that it was intended as a gift to A. Patrick Tonti. On April 8, 1964, Alfred E. Tonti, when delivering the stock certificates to the affiant, had also stated that the assignment was a gift to him.

"20. During the course of a review of my business records of investments in late June or early July, 1975, Joseph W. Slattery discovered a certain check number 342 drawn on my account at The Huntington National Bank, Columbus, Ohio, dated September 30, 1965, in the amount of $500 and made payable to Alfred E. Tonti's Broad-Westgate account, which check contained a notation on the face thereof that it was paid for the return of a loan of April 6, 1964 to purchase the stock of Tonti Securities Company. Upon finding this check, Joseph W. Slattery reported his discovery to me. Mr. Slattery's review of my investment books was made at my request and was undertaken to assure that my books accurately reflected my ownership of various securities and properties which had been questioned in litigation with the administrators of my father's estate.

"21. Until I was shown check number 342 by Joseph W. Slattery in late June or early July, 1975, I had no knowledge that said check existed or any of the facts surrounding the making of the check on September 30, 1965. Joseph W. Slattery, whose memory was refreshed by the discovery of the check, then for the first time revealed to me the circumstances surrounding this check, which are detailed in his affidavit filed simultaneously herewith.

"22. The signature ('A. Patrick Tonti') appearing on check number 342 is in the handwriting and was executed by Alfred E. Tonti, who was authorized to sign checks on my account at The Huntington National Bank. Alfred E. Tonti never informed me that he had signed check number 342. Between 1959 and August, 1966, Alfred E. Tonti executed and signed 620 checks of a total of 805 checks drawn on my account at The Huntington National Bank, including check number 342.

"23. During the period from 1959 through at least 1966, I did not manage or reconcile my checking account at The Huntington National Bank.

"24. During the period from 1959 to the present, I have not personally performed any of the accounting or bookkeeping work on the books and records of any corporations, partnerships, sole proprietorships or other investments owned by me.

"25. Without knowledge of and without reason to believe that any consideration or thing of value passed to my father Alfred E. Tonti in exchange for the assignment of shares of Tonti Securities to me, which shares my father had stated he delivered to me as a gift, and after having been informed by my

accountant, Joseph W. Slattery, and by Josephine Sheskey that my father had declared in their presence that the assignment of said stock was to be a gift, I had no reasonable basis to believe that check number 342 or any other such check existed.

"26. Because I was not informed of the existence of check number 342 or any other payment for the stock of Tonti Securities, I did not attempt to present any evidence of such consideration in the trial of this matter. Joseph Slattery did testify at the trial, but he did not then reveal the existence of check number 342.

"27. The newly discovered evidence uncovered by Joseph W. Slattery and communicated to me within the last month is material to the central issue in this case, that is, who owns the stock of Tonti Securities. Without knowledge of said evidence I was not able to properly present my claim to this Court, and the Court has issued a final judgment which is not based upon all of the material evidence, all to my prejudice and loss in as much as I have been unjustifiably deprived of my rightful ownership of the stock of Tonti Securities.

"28. The facts contained in this affidavit are true and correct to the best of my knowledge and belief. * * *"

Appellant's first assignment of error is:

"The Probate Court erred by overruling appellant's motion to vacate judgment without conducting an evidentiary hearing."

Appellant admits that Civ. R. 60(B) does not expressly require that a hearing be held. Appellant, however, contends that Ohio case law requires that it is the duty of the trial court before ruling on a Civ. R. 60(B) motion to first determine whether the motion raises issues of fact and law sufficient to constitute a valid ground for relief, and that if such issues are raised by the motion, it then becomes the duty of the trial court to either order and conduct an evidentiary hearing, or give the parties by order notice and opportunity to submit additional evidence by affidavits before ruling on the motion. Appellant relies primarily upon *Matson v. Marks* (1972), 32 Ohio App. 2d 319; *Adomeit v. Baltimore* (1974), 39 Ohio App. 2d 97; and *Brenner v. Shore* (1973), 34 Ohio App. 2d 209.

We find that the facts of the present case are clearly distinguishable from those present in *Matson*. *Matson* was an appeal from an order of the Franklin County Court of Common Pleas overruling defendant's motion to vacate and set aside a cognovit judgment and to grant him leave to file an amended answer. The judgment debtor filed a motion to vacate and tendered an amended answer alleging that no consideration was given for the note and that the note was executed "under duress and as a result of threats made by plaintiff's decedent to defendant * * *" which, if established, would have constituted a valid defense to the judgment. No evidentiary hearing was held by the trial court prior to the rendering of its decision. In our decision in *Matson*, we recognized that the procedure to be followed "* * * depends to some degree upon the circumstances surrounding the obtaining of the judgment and the nature of the relief sought * * *." Judgments were classified into three general categories: (1) judgments entered following an adversary hearing—a trial on the merits, and motion for summary judgment, or other motion; (2) judgments entered by default and (3) judgments entered on a confession of judgment pursu-

ant to a warrant of attorney, without prior notice to the defendant.

In contrast to *Matson, supra,* where the underlying judgment had been rendered upon a cognovit judgment by the court without any knowledge of the facts involved by the process of an adversary trial, and where the motion to vacate was accompanied by absolutely no evidence in support of the motion to vacate, here, the original judgment was entered following an extensive eleven day trial, with testimony by twenty witnesses, the submission of one hundred seventy-five exhibits, and two depositions. Here, the motion for relief from judgment was accompanied by two lengthy affidavits which set forth the exact nature of the newly discovered evidence, where the evidence was found, the circumstances under which the evidence was found, and why the evidence could not have been submitted earlier through due diligence; also exhibits and a lengthy legal brief.

Clearly, the operative facts were before the Probate Court relating to the newly discovered evidence and framed by the trial court's extensive knowledge of the case at the original lengthy trial. The Probate Court accepted the appellant's version of the newly discovered evidence in the light most favorable to the appellant, stating:

> "* * * Solely for the purposes of rendering this decision, this court accepts the statements in such affidavits as true * * *."

Clearly, the trial court here had sufficient factual information, accepting as true the affidavits submitted by appellant, to enable it to intelligently rule upon appellant's motion. We find, therefore, that the judgment of the Probate Court in ruling upon appellant's motion for relief

from judgment, based upon newly discovered evidence, was an informed judgment and, therefore, no further hearing was required under Civ. R. 60(B), or the law of Ohio; and therefore appellant's first assignment of error is overruled.

Appellant's second assignment of error is:

> "Appellant was denied a fair hearing before an unbiased judge by reason of the bias and prejudice of the probate judge in favor of the administrator of the estate and bias and prejudice against appellant."

We find that this court lacks jurisdiction to determine this matter, it having been previously determined by the Chief Justice of the Ohio Supreme Court before whom this matter had previously been raised. While the present motion for relief from judgment, filed August 6, 1975, was pending ruling by the Probate Court, appellant's affidavit of prejudice seeking to disqualify the probate judge was filed September 5, 1975. On October 27, 1975, the Chief Justice of the Ohio Supreme Court found, as a matter of law, that there was no legal prejudice on the part of the probate judge. On December 9, 1975, appellant's motion for relief from judgment was overruled by the Probate Court. The fact that the Chief Justice of the Ohio Supreme Court subsequently, on May 6, 1976, held that the probate judge is hereby disqualified from further proceedings in the present cause does not affect the action taken by the Probate Court on December 9, 1975. At that time, the question of prejudice had been determined and there was a ruling by the Chief Justice that there was no bias or prejudice on the part of the probate judge. It is clear that that order is not subject to review by this court. Appellant's second assignment of error is overruled.

Appellant's third assignment of error is:

"Appellant is entitled to a new trial on the basis of newly discovered evidence."

The question before the trial court was whether the new evidence submitted by appellant was of such a nature that by due diligence could not have been discovered in time to move for a new trial under Civ. R. 59(B). The only facts before the Probate Court were those submitted by way of affidavits of appellant. Appellees submitted a memorandum in opposition to the motion but did not contest the validity of the facts as set forth by the appellant. The Probate Court having before it the facts upon which the original judgment was based, along with the lengthy affidavits submitted by appellant relating to the motion for relief from judgment accepted appellant's statements found in his affidavits as true and found that the "* * * so-called newly discovered evidence consists of documents found in movant's own records which have been in his continuous possession and control since before the inception of this litigation. The movant is himself an attorney and has participated actively in this matter. For him to present such evidence almost three years after the beginning of this action does not meet the due diligence test of Civ. R. 60(B)(2)." The judgment of the Probate Court was based specifically upon appellant's failure to meet the due diligence requirements imposed by Civ. R. 60(B)(2). The granting or refusing of a new trial on the grounds of newly discovered evidence rests largely within the sound discretion of the trial court and when such discretion has not been abused, reviewing courts should not interfere. *Hawkins v. Crosby* (1954), 71 Ohio Law Abs. 82, at page 84. We find that the Probate Court exercised sound judgment in the exercise of its discretion

and, therefore, appellant's third assignment of error is overruled, and the judgment is affirmed.

Judgment affirmed.

REILLY, J., concurs.
WHITESIDE, J., dissents.

WHITESIDE, J., dissenting.

This cause involves a motion for relief from judgment pursuant to Civ. R. 60(B)(2) predicated upon "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B)." Two lengthy affidavits were submitted in support of the motion. Although the trial court was not required to accept the affidavits as true, and could have conducted an evidentiary hearing, and have weighed the evidence and made factual findings accordingly, the trial court did not choose to do so. Rather, the trial court in its decision specifically "accepts the statements in said affidavits as true."

If the affidavits are accepted as true, a compelling basis for sustaining the motion is presented. The affidavits if fully accepted clearly permit only one reasonable conclusion; namely, that there has been discovered new evidence most material to the issues which could not have been discovered by appellant in the exercise of due diligence in time to move for a new trial under Civ. R. 59(B).

Under such circumstances, it was error for the trial court to overrule the motion for relief from judgment, at least without evidence controverting the affidavits, which the trial court accepted as true.

Accordingly, I would reverse the judgment and remand the cause for further consideration of the motion for relief from judgment pursuant to Civ. R. 60(B)(2).

APPENDIX C

OPINION OF FRANKLIN COUNTY PROBATE COURT

(Filed December 9, 1975)

Case No. 277,519

IN THE PROBATE COURT OF FRANKLIN COUNTY, OHIO

IN THE MATTER OF THE ESTATE OF ALFRED E. TONTI, deceased

OPINION

This matter came on for hearing before this Court on the Motion of A. Patrick Tonti for relief under Civil Rule 60(B) from the final judgment of this Court entered herein on November 1, 1974 and for a new trial on Exceptions to the Partial Inventory of this estate.

Alfred E. Tonti died on January 5, 1972. Thereafter an administration of an estate was commenced in this Court and fiduciaries were appointed. Said fiduciaries filed a partial inventory of the assets of the estate, said partial inventory including the shares of stock of Tonti Securities Company. A. Patrick Tonti filed Exceptions to said inventory and specifically to the shares of stock of Tonti Securities Company listed therein, claiming the said shares to be his own. The matter came on for hearing on the Exceptions and approximately twenty witnesses testified for a period of some eleven days. Approximately 175 exhibits were admitted. After the final judgment of this Court, as above referred to, A. Patrick Tonti caused

an Appeal to be filed with the Court of Appeals of Franklin County, Ohio. The Court unanimously upheld the decision of this Court. The said Movant then prosecuted an Appeal to The Ohio Supreme Court and on September 5, 1975 that Court overruled the Motion to certify the record.

On August 6, 1975, while this matter was pending before the Supreme Court of Ohio, A. Patrick Tonti filed a Motion in this Court for the relief sought for, the subject of this Opinion. In support of said Motion, A. Patrick Tonti has submitted his Affidavit and the Affidavit of Joseph W. Slattery. Solely for the purpose of rendering this decision, this Court accepts the statements in such Affidavits as true. Considering the statements in the Affidavits now submitted together with the record of the trial previously had, this Court finds that A. Patrick Tonti has failed to show that the judgment of November 1, 1974 was the result of mistakes, inadvertents, surprise or excusable neglect, and is therefore not entitled to relief under Ohio Civil Rule 60(B)(1).

The primary argument of the Movant is that under Rule 60(B)(2) there is newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under 59(B). The so-called newly discovered evidence consists of documents found in the Movant's own records and which have been in his continuous possession and control since before the inception of this litigation. The Movant is himself an attorney and has participated actively in this matter. For him to present such evidence almost three years after the beginning of this action does not meet the due diligence test of Rule 60(B)(2). The Court further finds that even if the proffered evidence is used in its most favorable light, it does not constitute sufficient evidence against the full record

of the matter to cause this Court to reverse the judgment. Therefore, relief should not be granted under Rule 60 (B) (2).

Movant is not entitled to the requested relief under Rule 60(B) (5) since this section relates only to claims not covered specifically under the other sections of 60(B).

This Court therefore finds:

(1) That it has jurisdiction of the subject matter and the parties;

(2) That the Motion of A. Patrick Tonti for a new trial should be denied; and,

(3) The Motion of A. Patrick Tonti to vacate and set aside the final judgment rendered on November 1, 1974 should be denied.

/s/ RICHARD B. METCALF
Probate Judge

JUDGMENT ENTRY OF FRANKLIN COUNTY PROBATE COURT

(Filed December 9, 1975)

Case No. 277,519

IN THE
PROBATE COURT OF FRANKLIN COUNTY, OHIO

IN THE MATTER OF THE ESTATE OF
AFLRED E. TONTI, DECEASED

JUDGMENT ENTRY

This matter came on to be heard on Motion of A. Patrick Tonti for relief from the Final Judgment of this Court entered herein on November 1, 1974 and for a new trial.

The Court has considered the Affidavits presented by Movant and the detailed memoranda of counsel and has issued an Opinion.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

(1) The Motion of A. Patrick Tonti for a new trial is denied; and,

(2) The Motion of A. Patrick Tonti to vacate and set aside the Final Judgment of this Court entered on November 1, 1974 is denied and the said judgment shall stand.

/s/ RICHARD B. METCALF
Probate Judge

APPENDIX D

Affidavit of Prejudice of A. Patrick Tonti

AFFIDAVIT

STATE OF OHIO)
) SS:
COUNTY OF FRANKLIN)

A. PATRICK TONTI, being first duly sworn, says:

1. That on January 5, 1972, his father, Alfred E. Tonti, died.

2. That he was named Executor by his father in his father's Will.

3. That in March, 1972, in a hearing before Judge Richard B. Metcalf, Judge Metcalf forced affiant to step aside as Executor of his father's estate because of affiant's possible conflict of interest with said estate. Judge Metcalf then named The City National Bank and James C. Petropoulos as Co-Administrators of the Estate of Alfred E. Tonti, and James C. Petropoulos has acted as the primary administrator of the estate. James C. Petropoulos has acted for Judge Metcalf as his chief political campaign organizer, and Judge Metcalf has appointed James C. Petropoulos to many boards, committees and groups with great economic and political power to represent Judge Metcalf. Therefore, because of Judge Metcalf's intimate relationship with James C. Petropoulos, Judge Metcalf has created his own conflict of interest in matters involving James C. Petropoulos, Administrator of the Estate of Alfred E. Tonti vs. adversaries to said estate. Because of Judge Metcalf's intimate relationship with James C. Petropoulos, Judge Metcalf has been prejudiced against the affiant in

legal proceedings of said affiant vs. James C. Petropoulos, Administrator of the Estate of Alfred E. Tonti.

4. That in March, 1972, it was agreed between all parties and Judge Metcalf that a suit over the ownership of Tonti Securities stock must be commenced immediately and decided forthwith. The reason was that Tonti Securities owed $1,000,000.00, a loan which was fully due and payable June 30, 1972. Therefore, it was agreed that the ownership dispute should be resolved immediately so that all of the assets of Tonti Securities Company which were pledged as collateral for the $1,000,000.00 loan be not jeopardized by doubt as to ownership of Tonti Securities. Judge Metcalf, therefore, ordered the Administrator to file a partial inventory of the Estate of Alfred E. Tonti which listed only the stock of Tonti Securities so that affiant could object to said ownership claim by the estate and a hearing on said dispute of said ownership could take place on April 12, 1972. Affiant was ready for this trial date.

5. Judge Metcalf, on request of parties other than affiant, postponed the trial five times:

from April 12, 1972 to May, 1972;

from May, 1972 to June, 1972;

from June, 1972 to September, 1972;

from September, 1972 to October, 1972;

from October, 1972 to November, 1972.

6. That in November, 1972, trial commenced for approximately ten (10) days of hearings in which affiant put on his witnesses and evidence. Affiant attempted to call Mary B. Tonti as witness over her objection. Judge Metcalf then asked for a short delay of the trial and a meeting of all counsel in his chambers. The trial was

halted thereby and Judge Metcalf did not resume this trial for ONE FULL YEAR thereafter.

7. During the time this trial was postponed, Judge Metcalf told this affiant that he must settle this matter with his Administrator, James C. Petropoulos, because Judge Metcalf had not decided similar cases before and he was not going to decide this one. Judge Metcalf told this affiant that he would be angered with this affiant if affiant did not settle this case with the Administrator, James C. Petropoulos.

8. That this affiant attempted to settle with Administrator Petropoulos, but he demanded that affiant pay the estate the full value of Tonti Securities and stated "if you don't, Judge Metcalf will be angry with you." That this affiant was thereby unable to meet Administrator Petropoulos' unreasonable demands and asked that the trial be completed.

9. The trial was completed in November and December, 1973, and fully submitted to the Court by February 15, 1974.

10. Judge Metcalf, who had agreed in March, 1972, that this dispute needed immediate resolution did not reach his decision until October 7, 1974, eight (8) months after the case was fully submitted, and two and one-half (2½) years after the case was set for trial. This decision came twelve (12) days after this affiant sued Administrator Petropoulos on another unrelated matter involving the Estate of Alfred E. Tonti. That this affiant believes that Judge Metcalf was obviously prejudiced against this affiant and that he used the power of his court to delay the trial of the matter and delay the decision in the matter involving the ownership of Tonti Securities for two and one-half (2½) years and that he used this delay to bring

undue pressure on this affiant. During this delay, affiant believes James C. Petropoulos, an intimate and confidant of Judge Metcalf, as Administrator of the Estate of Alfred E. Tonti, colluded with Judge Metcalf in Judge Metcalf's plan to "hold this affiant hostage", as it were, by delaying and postponing the trial and the decision in the matter.

11. Judge Metcalf and Administrator Petropoulos knew prior to the commencement of the trial, November, 1972, that without Tonti Securities Company, the estate would likely be insolvent. The Co-Administrator of the Estate of Alfred E. Tonti filed the attached affidavit, marked Exhibit A, in an unrelated lawsuit involving the Estate vs. Western Estates Corporation, a corporation owned by this affiant. If the estate were insolvent, Judge Metcalf well knew that he could not award James C. Petropoulos substantial administrator fees and Judge Metcalf well knew many other problems that insolvency would create for his Administrator James C. Petropoulos.

12. In January, 1974, there was pending in Judge Metcalf's Probate Court, approximately nine (9) other disputes of ownership of stock between the Estate of Alfred E. Tonti and this affiant, and approximately four (4) or five (5) more disputed issues between the estate and others. This affiant informed his attorney, John M. Adams, that this affiant believed that Judge Metcalf was prejudiced against the affiant and wanted Judge Metcalf removed from hearing these matters and an impartial judge take his place. That John Adams related to this affiant that he visited Judge Metcalf and that he said the conversation between them was as follows: (By John Adams) "My client, Pat Tonti, wants you to step aside in certain disputes between him and the Estate of Alfred E. Tonti now pending in your court. My client, Pat Tonti, thinks you are prejudiced against him and, therefore, can-

not get a fair hearing with you as judge." (By Judge Metcalf) "He's right, John, I am prejudiced against him." That thereafter Judge Metcalf withdrew from these cases and they were heard by another judge in February, March, and April, 1975, and decided by said judge in July, 1975.

/s/ A. Patrick Tonti

(Jurat omitted in printing)

Certificate of Service

I certify that a copy of the foregoing Affidavit was mailed to The Honorable Richard B. Metcalf, Hall of Justice, 369 South High Street, Columbus, Ohio 43215; David S. Cupps, 52 East Gay Street, Columbus, Ohio 43215; and Lloyd E. Fisher, Jr., 17 South High Street, Columbus, Ohio 43215, this ..... day of October, 1975.

.....

APPENDIX E

Order of Ohio Chief Justice C. William O'Neill

Case No. 277,519

THE SUPREME COURT OF OHIO

In the Matter of the Estate of Alfred E. Tonti, Deceased

Franklin County Probate Court

ENTRY

The affidavit of prejudice filed herein being not well taken is hereby dismissed and held for naught.

Dated this 27th day of October, 1975.

/s/ C. William O'Neill
Chief Justice
The Supreme Court of Ohio